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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

STUART TWITCHELL,

Plaintiff,

v.

WENDY PARIS, et al.,

Defendants.

Case No. 2:06-0283-KJD-GWF

**ORDER**

Currently before the Court is Plaintiff's Motion for Summary Judgment (#22), filed December 8, 2006. Defendants filed a Response (#24), on December 26, 2006, to which Plaintiff filed a Reply (#28), on January 10, 2007.

**I. Background**

Plaintiff Stewart Twitchell ("Twitchell") a Nevada licensed real estate broker, on March 7, 2006, filed a Complaint against Wendy Paris, ("Paris") and Testamentary Trust, alleging causes of action for (1) breach of contract, (2) unjust enrichment, and (3) breach of covenant of good faith and fair dealing. Plaintiff's Complaint, and Motion for Summary Judgment allege that Paris breached a real estate commission agreement entered into between the parties by refusing to pay Twitchell a real

1 estate commission if he procured a purchaser of Defendants' ranch property. In opposition, Paris  
2 argues that various issues of material fact exist that preclude summary judgment.

3 According to Twitchell, in or around October 2001, he became aware that Jim West, Wade  
4 West, and UU livestock-Nevada, L.L.C. (collectively referred to as "West") were interested in  
5 purchasing a ranch in or near White Pine County, Nevada. Shortly thereafter, Twitchell traveled to  
6 the Bertrand Paris and Sons Livestock Sheep and Cattle Ranch (the "Paris Ranch") where he met  
7 ranch owner, Wendy Paris, and inquired about whether she might be interested in selling the ranch.  
8 Paris stated that she was interested, and Twitchell proposed that he would attempt to sell the Paris  
9 Ranch if Paris would agree to pay him a real estate commission in the event that he found someone  
10 willing to purchase the ranch.

11 Shortly thereafter, Twitchell contacted the Wests and discovered they were interested in  
12 buying the Paris Ranch. Twitchell then introduced the Wests to Paris and showed them the Paris  
13 Ranch on October 14, and 15, 2001. According to Twitchell, he then spent time investigating and  
14 identifying the deeded acres, BLM grazing rights, and AUM permits relating to the Paris Ranch.  
15 During this time, Twitchell presented and entered into a commission agreement with Paris that  
16 provided *inter alia*, that Paris would pay Twitchell a real estate commission of "ten percent of the  
17 gross sales price of any buyer, prepared by [Twitchell] to be ready, willing and able to purchase [the  
18 Paris Ranch] in an amount agreed upon by Paris as evidenced by Paris['s] acceptance of an offer."  
19 (Pl.'s Mot. for Summ. J. Ex. 1A.) The commission agreement was to remain in force for 18 months  
20 from the date of the signing and was to be honored for an additional nine months for any buyers  
21 exposed to the Paris Ranch by Twitchell during the 18 month period. The agreement was signed and  
22 executed on October 15, 2001.

23 According to Twitchell, after showing the Paris Ranch to the Wests, Twitchell contacted  
24 them to solicit a purchase offer. Twitchell also contacted Paris on several occasions to find out if the  
25 Wests had made a purchase offer directly to Paris. Each time, Paris either denied that the Wests had  
26 made an offer to purchase the Paris Ranch, or denied that she was willing to sell.

1 Twitchell states that he later discovered Paris began intensive negotiations directly with the  
2 Wests and their real estate broker Tom Gunn shortly after Twitchell had introduced the Wests to  
3 Paris and showed them the Paris Ranch. Twitchell also discovered that the Wests negotiated and  
4 entered into a lease option with Paris for the Paris Ranch sometime during the two years prior to  
5 making their final purchase offer. The Wests sent Paris a written purchase offer in October 2003,  
6 and made a final purchase offer on November 25, 2003. Paris accepted the Wests' purchase offer on  
7 December 10, 2003, for \$1,700,000. Paris never informed Twitchell that the Wests had contacted  
8 her in regard to purchasing the Paris Ranch, and Twitchell was never involved in the negotiations of  
9 either the lease option or actual purchase. Twitchell claims that the sale was within the 27-month  
10 period provided for in the commission agreement, and that the commission due and owing to him is  
11 \$170,000.

12 In opposition to Twitchell's Motion for Summary Judgment, Defendants argue that there are  
13 several issues of material fact barring summary judgment. *Inter alia*, Defendants contend that there  
14 are genuine issues of material fact regarding whether Twitchell was the procuring cause of the  
15 ultimate sale of the ranch property to the Wests; whether the terms of the ultimate sale were the  
16 proximate result of Twitchell's peculiar activities; whether the chain of events that Twitchell set in  
17 motion was broken prior to purchase; whether Twitchell abandoned efforts to consummate the sale  
18 of the ranch property; whether the term of the commission agreement expired prior to the ultimate  
19 sale; and whether the terms of the actual sale differed materially from those specified in the  
20 commission agreement.

## 21 **II. Standard of Law for Summary Judgment**

22 Summary judgment may be granted if the pleadings, depositions, answers to interrogatories,  
23 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any  
24 material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ.  
25 P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the  
26 initial burden of showing the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323.

1 The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine  
 2 factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587  
 3 (1986); Fed. R. Civ. P. 56(e).

4 All justifiable inferences must be viewed in the light most favorable to the nonmoving party.  
 5 See Matsushita, 475 U.S. at 587. However, the nonmoving party may not rest upon the mere  
 6 allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit  
 7 or other evidentiary materials provided by Rule 56(e), showing there is a genuine issue for trial. See  
 8 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need only resolve factual  
 9 issues of controversy in favor of the non-moving party where the facts specifically averred by that  
 10 party contradict facts specifically averred by the movant. See Lujan v. Nat'l Wildlife Fed'n., 497  
 11 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 345  
 12 (9th Cir. 1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine  
 13 issue of fact to defeat summary judgment). “[U]ncorroborated and self-serving testimony,” without  
 14 more, will not create a “genuine issue” of material fact precluding summary judgment. Villiarimo v.  
 15 Aloha Island Air Inc., 281 F.3d 1054, 1061 (9th Cir. 2002).

16 Summary judgment shall be entered “against a party who fails to make a showing sufficient  
 17 to establish the existence of an element essential to that party’s case, and on which that party will  
 18 bear the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary judgment shall not be granted  
 19 if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248.

### 20 **III. Analysis**

21 Under Nevada law, the determination of whether a broker is the procuring cause of a sale is a  
 22 question of fact that is generally not appropriate for summary judgment. See e.g., Carrigan v. Ryan,  
 23 858 P.2d 29, 32 (Nev. 1993). Specifically, the Nevada Supreme Court has stated,

24 Whether a broker’s efforts constitute the ‘procuring cause’ of a sale is a question of  
 25 fact. Thus, this issue is not generally appropriate for summary judgment. The  
 26 determination of this ultimate factual issue depends upon a close examination of the  
 prevailing circumstances in each case.

1 Id. (citing Atwell v. Southwest Securities, 820 P.2d 766 (Nev. 1991)). In many cases, the Nevada  
 2 Supreme Court has overturned a lower court's decision to grant summary judgment where the degree  
 3 of procurement was at issue. See e.g., Carrigan, 858 P.2d at 33; Atwell, 820 P.2d at 770; Morrow v.  
 4 Barger, 737 P.2d 1153, 1157–58 (Nev. 1987).

5 Although the concept of 'procuring cause' is not conducive to precise legal measurement, the  
 6 Nevada Supreme Court has recognized some general principles applicable in making such a  
 7 determination. See Carrigan, 858 P.2d at 32. For example, "a broker's efforts in bringing about the  
 8 sale must be more than 'merely trifling.' Id. at 32–33 (quoting Binder v. Leavy Realty Co., 790 P.2d  
 9 497, 499 (1990)). Additionally, "[w]hether the broker first approaches, or brings to the attention of  
 10 the buyer that the property is for sale, or brings the buyer into the picture, has considerable weight in  
 11 determining whether the [broker] is the procuring cause of the sale." Carrigan, 858 P.2d at 33 (citing  
 12 Atwell, 820 P.2d at 770). "However, whether the broker initially introduces the buyer and seller is  
 13 not dispositive as a matter of law." Carrigan, 858 P.2d at 33 (citing Morrow, 737 P.2d at 1157  
 14 (where brokers introduced buyers and sellers, issue of procuring cause still depended on whether  
 15 brokers were the proximate cause of the sale). Furthermore, a broker is required to demonstrate that  
 16 he was the proximate cause of the sale, Carrigan, 858 P.2d at 33, or that he/she "set in motion a chain  
 17 of events which, without break in their continuity, cause the buyer and seller to come to terms as the  
 18 proximate result of his or her peculiar activities." Id. at 32 (quoting Binder v. Leavy Realty Co., 790  
 19 P.2d 497, 500 (Nev. 1990)).

20 Without addressing the myriad reasons set forth in Defendants' Opposition explicitly, the  
 21 Court finds that sufficient issues of material fact exist that preclude summary judgment. Specifically,  
 22 and at a minimum, the Court finds that the determination of whether Plaintiff was the procuring  
 23 cause of the ultimate sale of the Paris Ranch to the Wests is a genuine issue of material fact requiring  
 24 a close examination of the circumstances of the case. That Plaintiff had a commission agreement and  
 25 undisputedly introduced the buyer to the seller is not dispositive. Additionally, the Court finds a  
 26 material issue of fact exists as to whether Plaintiff was the proximate cause of the ultimate sale of the

1 Paris Ranch to the Wests. Therefore, viewing all justifiable inferences in the light most favorable to  
2 Defendants, the Court must deny Plaintiff's Motion for Summary Judgment at this time.

3 **IV. Conclusion**

4 For the reasons listed above, Plaintiff's Motion for Summary Judgment (#22) is hereby  
5 **DENIED.**

6 DATED this 27th day of September, 2007.

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11 Kent J. Dawson  
12 United States District Judge  
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